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No. 08-508

In The

Supreme Court of the United States

MICHAEL W. RYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the FBI violate the Fourth Amendment's prohibition against warrantless seizures when it rented cars and intentionally broke the windshields, without first getting a warrant?

2. Did the Government violate Fed R. Evid. 1002, when it allowed witnesses to characterize a written contract, without introducing into evidence the actual written policy?

3. Does the Government's subornation of false testimony and knowledge of the testimony's falsity require reversal?

LIST OF ALL PARTIES

Michael W. Ryan

United States of America

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	vi
CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS	1
BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	2
ARGUMENT	7
I. THE NINTH CIRCUIT'S DECISION REGARDING THE FBI'S SEIZURE OF RYAN'S WINDSHIELDS CONFLICTS WITH THIS COURT'S DECISIONS IN *JACOBSEN* AND *SOLDAL*	7
A. AN UNLAWFUL SEIZURE OCCURS WHEN THE GOVERNMENT DEPRIVES A PERSON OF HIS POSSESSORY INTEREST IN PROPERTY WITHOUT A WARRANT	8
B. THE FBI UNLAWFULLY SEIZED RYAN'S VEHICLES WHEN AGENTS INTENTIONALLY DAMAGED WINDSHIELDS AS PART OF THEIR INVESTIGATION	10
C. THE NINTH CIRCUIT INCORRECTLY APPLIED AN EXPECTATION OF PRIVACY ANALYSIS	11

TABLE OF CONTENTS – Continued

Page

D. THE DESTRUCTION OF THE WINDSHIELD WAS NOT *DE MINIMIS* 13

II. THE NINTH CIRCUIT'S RULING ON RULE 1002 CONFLICTS WITH FIRST CIRCUIT PRECEDENT 14

A. THE BEST EVIDENCE RULE REQUIRES THE ADMISSION OF THE ORIGINAL WRITING WHEN THAT WRITING'S CONTENTS ARE BEING PROVEN 14

B. THE GOVERNMENT WAS TRYING TO PROVE THE CONTENTS OF CHRYSLER'S MANUAL 15

III. THE NINTH CIRCUIT SANCTIONED THE GOVERNMENT'S ELICITATION OF FALSE TESTIMONY. THIS SANCTION IS IN DIRECT CONTRADICTION TO THIS COURT'S HOLDINGS IN *MOONEY v. HOLOHAND* AND *NAPUE v. ILLINOIS* 21

A. *NAPUE* REQUIRES REVERSAL 22

1. THE GOVERNMENT KNOWINGLY PRESENTED FALSE TESTIMONY 23

CONCLUSION 24

TABLE OF CONTENTS – Continued

Page

APPENDIX

Memorandum, *United States v. Ryan*, 2008 WL 2483382 (9th Cir., June 19, 2008) ..... App. 1

Order Denying Defendants' Motion to Suppress Evidence, *United States v. Ryan*, No. CR-06-73-BLG-RFC (D. Mont. Aug. 31, 2006) ..... App. 8

Order, *United States v. Ryan*, No. 07-30319 (9th Cir., July 28, 2008) ..... App. 16

Volume 3, Transcript of Jury Trial, *United States v. Ryan*, No. CR-06-73-BLG-RFC ..... App. 17

Volume 4, Transcript of Jury Trial, *United States v. Ryan*, No. CR-06-73-BLG-RFC ..... App. 21

TABLE OF AUTHORITIES

Page

CASES

Brown v. Muhlenberg Township, 269 F.3d 205 (3rd Cir. 2001) 9

Conway v. Consol. Rail Corp., 720 F.2d 221 (1st Cir. 1983) 14

Freeman v. City of Dallas, 242 F.3d 642 (5th Cir. 2001) 9

Katz v. United States, 389 U.S. 347 (1967) 8

Maryland v. Macon, 472 U.S. 463 (1985) 8

Mooney v. Holohand, 294 U.S. 103 (1935) 21, 22

Morris v. Ylst, 447 F.3d 735 (9th Cir. 2006) 22

Napue v. Illinois, 360 U.S. 264 (1959) 21, 22, 24

Neder v. United States, 527 U.S. 1 (1999) 15

Northern Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001) 22

Oliver v. United States, 466 U.S. 170 (1984) 8

People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853 (1956) 22

Soldal v. Cook County, Illinois, 506 U.S. 68 (1992) 7, 8, 9, 11, 12

United States v. Agurs, 427 U.S. 97 (1976) 22

United States v. Bennett, 363 F.3d 947 (9th Cir. 2004) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Howard, 953 F.2d 610 (11th Cir. 1992) 14

United States v. Jacobsen, 466 U.S. 109 (1984) ..... *passim*

United States v. Paige, 136 F.3d 1012 (5th Cir. 1998) 8, 9

United States v. Ryan, No. CR-06-73-BLG-RFC (D. Mont. Aug. 31, 2006) 1

United States v. Ryan, 2008 WL 2483382 (9th Cir., June 19, 2008) 1

United States v. Ryan, No. 07-30319, Order (9th Cir., July 28, 2008) 1

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fourth Amendment 2, 8, 9, 12

STATUTES AND RULES

18 U.S.C. § 371 2

18 U.S.C. § 1341 2

18 U.S.C. § 1343 2

18 U.S.C. § 3231 2

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 1002 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

34 Geo. L.J. Ann. Rev. Crim. Proc. 5-6 (2005) 8

Broun, *Authentication & Contents of Writings*, 1969 Law & Soc. Order 611, 616 (1969).....15

6 Jack B. Weinstein and Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE, § 1002.03[1], (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997) 14

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS

United States v. Ryan, No. CR-06-73-BLG-RFC (D. Mont. Aug. 31, 2006) (Order Denying Motion to Suppress). There is no Westlaw citation available for this Order. App. 8-15.

The Ninth Circuit denied Ryan's appeal in an unpublished slip opinion. The Westlaw citation is *United States v. Ryan*, 2008 WL 2483382 (9th Cir., June 19, 2008). The cause number is 07-30319, Memorandum (denying appeal). App. 1-7.

United States v. Ryan, No. 07-30319, Order (9th Cir., July 28, 2008) (denying Petition for Rehearing and Petition for Rehearing *En Banc*). There is no Westlaw citation available for this Order. App. 16.

BASIS FOR JURISDICTION

The Ninth Circuit denied this appeal on June 19, 2008. App. 1. The Ninth Circuit Court of Appeals denied the Petition for Rehearing and Petition for Rehearing *En Banc* on July 28, 2008. App. 16. The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THIS CASE

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Fed. R. Evid. 1002.

STATEMENT OF THE CASE

The United States District Court for the District of Montana had subject matter jurisdiction over this case based on 18 U.S.C. § 3231. Ryan was charged with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371, and multiple counts of mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).

This case involves an alleged conspiracy to defraud car renters and/or car renters' insurance companies. Ryan owned Thrifty Car Rental in Billings,

MT, and branches elsewhere, including Cody and Jackson, WY; Belgrade, MT; and Idaho Falls, ID. Ryan is alleged to have conspired with Kevin Massick of Fas-Break (a windshield replacement business) and Thrifty employee Jeffrey Loney, to defraud renters whose windshields were damaged by charging the renter for a new windshield.

Thrifty's rental cars were supplied almost exclusively from DaimlerChrysler ("Chrysler"). Thrifty purchased cars from Chrysler. At the end of a period of time, Chrysler, pursuant to contract, would buy the cars back from Thrifty. Although some wear and tear was tolerated by Chrysler, Thrifty was generally assessed for any damages to the car. Regarding windshield damage, Chrysler's written contract with Ryan did not tolerate any windshield damage on returned vehicles. Put another way, any wear and tear tolerance by Chrysler did not apply to windshields. For the time of the conspiracy, Chrysler's written policy regarding windshields stated:

- **2000:**

  Glass is to be void of damage (repaired glass not acceptable).

- **2001:**

  Glass is to be void of damage (repaired glass not acceptable). **Vehicles that arrive at the return center with repaired glass will be placed in a withdrawn status.**

- **2002:**

  Damaged glass must be replaced. Previously repaired windshields are unacceptable. Any windshield replacement at the Marshaling Center must be Mopar/Safeguard Glass.

- **2003:**

  Damaged glass must be replaced and meet original specifications. Brands include Mopar/Safeguard . . . Previously repaired windshields are unacceptable. Mopar/Safeguard should be the first choice brand based on availability in the market place.

If Ryan returned a car to Chrysler with a damaged windshield, Ryan would be assessed a fine to compensate for Chrysler's cost of replacing the damaged windshield. To account for this fine, Ryan warned renters before they rented cars that he would charge them for a new windshield if they returned their car with a damaged windshield. Ryan also offered renters windshield insurance.

At some point prior to the charged indictment period, Massick approached Loney (and subsequently Ryan) about working out a deal on windshield glass. The three agreed that Ryan would give Fas-Break Thrifty's windshield business, in exchange for a rebate on the profits Fas-Break made on the glass. That was the entirety of the deal. Accordingly, when cars were returned to Ryan with damaged windshields the cars

and renters were turned over to Fas-Break for windshield work. Depending on the extent of damage to the windshield, and whether the car was immediately needed for another rental, Fas-Break either repaired or replaced the windshield. Knowing that all windshields would eventually need to be replaced per Chrysler policy, Fas-Break charged the renters full retail price for a new windshield. Occasionally renters contacted Fas-Break to complain about the price of the new windshields. In response, Fas-Break sent a standard letter to the renter explaining, in part, "Any damage what-so-ever to the windshields must be replaced according to Chrysler." Ryan did not write nor endorse the writing of Fas-Break's letter, but the letter was used against him by virtue of the *Pinkerton* doctrine.

The Government's Indictment alleges that Fas-Break, with the cooperation of Ryan, conspired to commit and committed mail and wire fraud by falsely characterizing Chrysler's return policy regarding the necessity of replacing windshields. At trial, the primary false statement the Government allegedly proved was that Ryan (through his co-conspirators) mischaracterized Chrysler's return policy as requiring replacement when, according to the Government, no such policy existed.

At trial, two witnesses, Schemm and Hambrecht,[1] were allowed to testify that Chrysler had a written policy that windshields with minor chips did not need to be replaced before being returned to Chrysler. App. 25, 28. Despite having the actual Chrysler policies in hand, the Government did not introduce the written policies at trial. Further, despite knowing that the actual Chrysler policies did not allow damaged or repaired glass to be returned to Chrysler, the Government suborned testimony that the policies did allow damaged glass. App. 25-28. After this testimony, the Government did not apprise the district court or jury that the testimony was false.

During the course of its investigation, undercover FBI agents rented cars from Thrifty and intentionally broke the windshields using a BB attached to the end of a rubber band. The FBI then returned the cars to Thrifty in an effort to catch Ryan in the act of the alleged scheme. The FBI did not procure a warrant prior to damaging the windshields. The evidence gathered by the FBI as a result of its intentional damaging of Ryan's windshields was used to procure a subsequent search warrant for Ryan's business, and five of the fraud counts of conviction were based on the FBI rentals.

Ryan was convicted and sentenced to 71 months in prison and ordered to pay approximately $150,000

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[1] Schemm and Hambrecht worked for Chrysler and Thrifty National.

in fines and restitution. Ryan appealed, arguing, among other things, that the FBI's intentional chipping of the windshields constituted an unconstitutional warrantless seizure, and that the Government violated the Best Evidence Rule in allowing testimony regarding Chrysler's written policy, without introduction of that policy. The Ninth Circuit denied Ryan's appeal in a seven-page (double spaced) unpublished Memorandum that spent one paragraph each dismissing the seizure and Best Evidence Rule issues. App. 1-7. The Ninth Circuit cited almost no case law, and provided little analysis of how it reached its conclusions. The Ninth Circuit's apparent reasoning is patently flawed, and is directly contrary to binding precedent and the United States Constitution.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION REGARDING THE FBI'S SEIZURE OF RYAN'S WINDSHIELDS CONFLICTS WITH THIS COURT'S DECISIONS IN *JACOBSEN* AND *SOLDAL*.

The Ninth Circuit held that there was no seizure in this case because Ryan did not have an expectation of privacy in his rental cars. With that holding, the Ninth Circuit improperly injected privacy into its seizure analysis.

A. AN UNLAWFUL SEIZURE OCCURS WHEN THE GOVERNMENT DEPRIVES A PERSON OF HIS POSSESSORY INTEREST IN PROPERTY WITHOUT A WARRANT.

In the typical case the government searches a person's car, house, or whatever, and seizes evidence. In these cases, the analysis of search and seizure typically runs together. The reviewing court analyzes whether the owner of the place or thing searched had an expectation of privacy in the place or thing searched that society was willing to recognize as objectively reasonable. *See, e.g., Oliver v. United States*, 466 U.S. 170, 177-78 (1984); *Katz v. United States*, 389 U.S. 347 (1967); 34 Geo. L.J. Ann. Rev. Crim. Proc. 5-6 (2005).

There are other cases, however, where there is only a seizure, and no search occurs at all. In these cases, the "expectation of privacy" analysis is not used. Instead, the reviewing court determines whether the government's seizure has meaningfully interfered "with an individual's possessory interests in the property that was seized." *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). "[T]he protection afforded by the Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished." *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998) (citing *Soldal v. Cook County, Illinois*, 506 U.S. 68 (1992)).

"Indeed, 'seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place.'" *Paige,* at 1021; *see also Soldal v. Cook County, Illinois*, 506 U.S. 56, 68 (1992) (finding that unconstitutional seizures can occur in cases where there is no expectation of privacy). "We thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is implicated." *Id.* at 65. "This text [of the Fourth Amendment] protects against two types of expectations, one involving 'searches,' the other involving 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

A seizure occurs, not only when the government confiscates property, but also when the government damages or destroys property. *Jacobsen*, at 124-25; *see also Freeman v. City of Dallas*, 242 F.3d 642, 647 (5th Cir. 2001) (finding a seizure when city demolished condemned buildings owned by complainants); *Brown v. Muhlenberg Township*, 269 F.3d 205, 210 (3rd Cir. 2001) (finding a seizure when police intentionally shot pet dog).

In *Jacobsen*, this Court found that a field test of a trace amount of cocaine so small that it went unnoticed by the defendants was a seizure because that trace amount was destroyed. "Here, the field test did affect respondents' possessory interests protected by the Amendment, since by destroying a quantity of the powder it converted what had been only a temporary

deprivation of possessory interests into a permanent one." *Id.* at 124-25 (finding that the seizure was excused because of law enforcement interests, the suspicious nature of the white powder, the amount seized was *de minimis*, etc.).

B. THE FBI UNLAWFULLY SEIZED RYAN'S VEHICLES WHEN AGENTS INTENTIONALLY DAMAGED WINDSHIELDS AS PART OF THEIR INVESTIGATION.

In their investigation of Ryan, the FBI rented eight cars under false pretenses from Ryan and intentionally broke the windshields by hitting the windshields with a BB pellet attached to the end of a rubber band. Under Ryan's (Thrifty's) written contract with Chrysler, Chrysler would not accept cars at the auction with damaged windshields, even if the damage was only a small crack or chip. If Ryan attempted to sell a car back to Chrysler with a chipped windshield, he would be assessed a penalty for the cost of a new windshield. In the alternative, if Ryan chose not to sell the cars back to Chrysler, but sell them on the private market once the cars' rental life had expired, the cars were worth less because of the damaged windshield. Thus, the result of the FBI's unwarranted actions was that Ryan's possessory interests in the windshields was damaged or destroyed.

Put another way, Ryan's possessory interest in the windshields was interfered with when the Government destroyed or damaged the windshields. Like the cocaine in *Jacobsen*, Ryan was no longer able to sell the windshields because of the damage intentionally inflicted by the FBI. The chief difference here, obviously, is that windshields are legal, and Ryan, unlike the defendants in *Jacobsen*, noticed the interference with the windshields.

C. THE NINTH CIRCUIT INCORRECTLY APPLIED AN EXPECTATION OF PRIVACY ANALYSIS.

The Ninth Circuit held there was no seizure because Ryan did not have an expectation of privacy in the windshields. "Ryan held no expectation of privacy in those vehicles. Indeed, he held them out to the general public for rental. This is precisely how the Government assumed possession and control of the vehicles – including the windshields." App. 3.

This analysis is incorrect in two ways. First, as discussed above, there is no "expectation of privacy" analysis when analyzing a seizure. *See Soldal*, at 65, 68; *Jacobsen*, at 113. In holding that there was no seizure because Ryan had no expectation of privacy in the vehicles, the Ninth Circuit failed to examine the material facts and, therefore, failed to properly apply the correct facts to the correct law.

Second, the Ninth Circuit made a fundamental mistake when it emphasized that the Government

gained possession and control of the vehicle "including the windshield" by renting it. App. 3. The Ninth Circuit appears to have found that because the FBI was able to rent the vehicles like an ordinary citizen, it had legal possession of the windshield for purposes of its seizure. This misses the point. The illegal seizure did not occur when the FBI rented the cars (or the cars' windshields), the seizure occurred when the FBI destroyed the windshields.[2] Thus, when the FBI returned the cars to Ryan, Ryan's possessory interest in the windshields was gone, or at least had been severely interfered with.

The Ninth Circuit appears to have completely ignored or missed this analysis. The result of its mistake is that it did not even analyze the correct seizure, and regardless, applied the incorrect expectation of privacy analysis. Its holding is, therefore, directly contrary to the Fourth Amendment, and this Court's interpretation of the Fourth Amendment in *Soldal* and *Jacobsen*.

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[2] The Ninth Circuit also missed the point by finding that if the public has access to the cars by rental, then so should the FBI for seizure purposes. First, that improperly implies an expectation of privacy analysis. Second, a seizure is not made legal simply because a private citizen could do what the government did. Such a rule would eviscerate the Fourth Amendment.

D. THE DESTRUCTION OF THE WINDSHIELD WAS NOT *DE MINIMIS*.

After first finding that there was no seizure, the Ninth Circuit (as did the district court) covered its back by holding that if the intentional chipping of the windshield was a seizure, it is excused as *de minimis*. App. 3-4. The Ninth Circuit, however, did not provide any explanation or reasoning of how the seizure is *de minimis*. Indeed, given that Ryan was sentenced to prison for six years and ordered to pay more than $150,000 in fines and restitution, based solely on chipped windshields, it seems very contrary to find that chipping windshields is *de minimis*.

As explained above, Ryan's contract with Chrysler required him to return cars to Chrysler with pristine windshields. When the FBI damaged the windshields, the FBI effectively forced Ryan to choose between buying new windshields or paying Chrysler's fee for a new windshield. Either way, the seizure was not *de minimis*.

II. THE NINTH CIRCUIT'S RULING ON RULE 1002 CONFLICTS WITH FIRST CIRCUIT PRECEDENT.

A. THE BEST EVIDENCE RULE REQUIRES THE ADMISSION OF THE ORIGINAL WRITING WHEN THAT WRITING'S CONTENTS ARE BEING PROVEN.

Fed. R. Evid. 1002 incorporates the Best Evidence Rule. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. Evid. 1002.

The purpose of the Best Evidence Rule is to ensure accuracy at trial and to prevent fraud or mistake by a party attempting to prove the contents of a writing. WEINSTEIN'S FEDERAL EVIDENCE, § 1002.03[1]; *United States v. Howard*, 953 F.2d 610, 612-13 (11th Cir. 1992).

In *Conway v. Consol. Rail Corp.*, 720 F.2d 221, 224 (1st Cir. 1983), the First Circuit held that a railroad conductor's testimony that he did not "have authority to stop a passenger from boarding a train with a footlocker" was properly excluded as not the best evidence of the railroad's written rules and regulations. The Ninth Circuit's ruling here is just the opposite, and allows witnesses to testify about the contents of written documents without introduction of the written document. It should be noted, however,

that this case also conflicts with the Ninth Circuit case of *United States v. Bennett*, 363 F.3d 947 (9th Cir. 2004), *cert. denied*, 543 U.S. 950 (2004) which required the introduction of the actual GPS when the police were testifying about the GPS's contents.

B. THE GOVERNMENT WAS TRYING TO PROVE THE CONTENTS OF CHRYSLER'S MANUAL.

The application of the Best Evidence Rule in this case is not a mere procedural issue. It has substantive consequences because its disregard resulted in the admission of testimony that was materially erroneous. *See* Broun, *Authentication & Contents of Writings*, 1969 Law & Soc. Order 611, 616 ("Surely the rule has occasionally prevented fraud and mistake, and in all probability, it has often prevented simple inaccuracy.").

In this case, the Government, through the testimony of Thrifty and Chrysler employees Hambrecht and Schemm, tried to establish falsity in Fas-Break's letters to renters that had damaged windshields based on Fas-Break's reference to Chrysler's zero tolerance policy of damaged windshields. Falsity is, of course, a material element in a mail fraud claim. *Neder v. United States*, 527 U.S. 1, 25 (1999).

Witnesses Schemm and Hambrecht falsely testified that Chrysler had a written policy allowing for the return of cars with minor windshield damage. The Government specifically asked the witnesses

about the written policy, and the witnesses specifically answered that the written policy allowed for cars to be returned with chipped windshields. Despite questioning the witnesses about the contents of the written policy, the Government did not introduce the actual policies as evidence.

Hambrecht testified first. At the beginning of his testimony, Ryan objected. The district court, recognizing that the questioning of Hambrecht was going to the content of the written policy, and that Rule 1002 required admission of the written policy, had the following dialogue with Hambrecht:

> THE COURT: Even without seeing the contract with a specific franchisee, are they all the same? Are the contracts all the same?
>
> THE WITNESS: Basically.
>
> THE COURT: Standard form?
>
> THE WITNESS: Yes. . . .

App. 18-19. The court then asked whether Hambrecht was aware of all the parameters of the Master Lease Agreements between Chrysler and Thrifty. "[W]hether you have the agreement in front of you or not. . . ."? App. 19. Hambrecht answered that he knew the "general parameters." App. 19.

The Government also knew that it was questioning Hambrecht about the contents of the written Chrysler policy:

WOLFF (AUSA): Yes, but if Your Honor would prefer, *we'll give him all of that stuff* and he can come back tomorrow.

THE COURT: That would solve some problems. It's not what I'd prefer. It's *what the law most likely requires.*

App. 19 (emphasis added).

With the Government's promise to bring the document, the court recessed until the following morning. The court and counsel then met in chambers on various issues. They were interrupted by the court's clerk, stating that FBI Agent Teeling "just called, and he said he's getting the master lease from Thrifty faxed to him right now." The court then stated, facetiously, that he hoped the attorneys would spend all night reviewing the master lease.

Even though the Master Lease Agreement had been faxed that afternoon from Thrifty to the FBI, *it did not surface the next day in the testimony of either Hambrecht or Schemm.* Inexplicably, even though the document had been promised the previous afternoon, the district judge allowed the testimony of both Hambrecht and Schemm, overruling Ryan's best evidence objection.

Hambrecht testified that Chrysler's policy, "allows up to three chips without what we call legs. . . ." Hambrecht conceded that he did not bring the policy

that would support his claim that Chrysler allowed a tolerance for windshield damage.

Schemm's testimony immediately followed Hambrecht's. He too was allowed to testify about what he claimed to be Chrysler's written policy without introduction of the actual policy. The prosecutor directed Schemm to the statement in Fas-Break's letter that said, "Any damage what-so-ever [sic] to the windshields must be replaced according to Chrysler." App. 25. The prosecutor asked Schemm, "Is that a true statement?" Schemm testified: "We *do allow* a certain amount of damage – " (emphasis added). App. 25. He claimed that Chrysler allows a certain number of chips and that, generally, if there are very little chips all over the windshield Chrysler allows return unless it is in the driver's line of sight. App. 25.

More damaging, knowing that Rule 1002 required the introduction of the written policy, the Government nevertheless specifically questioned Schemm about the contents of the policy:

> Q. WOLFF: Mr. Schemm, . . . that policy, *is that in any manuals or books* or anything that a person would read?
>
> A. SCHEMM: *Yes. There's a, there's a return policy that's issued* to all of the rental accounts at the time they decide to order new vehicles under our program, and it's part and parcel of the

entire program . . . It's about a 40 page document.

* * *

Q. WOLFF: And, let's just say, *if a forgetful attorney for the government* didn't tell people to bring the manual – well, did anyone ask you to bring a manual here?

A. SCHEMM: No.

Q. PARKER: And I'm going to object. I'm going to object to any discussion of a manual the jury can't see.

A. COURT: Overruled. If he has knowledge of it, he can testify.[3]

App. 26-27 (emphasis added).

Schemm's testimony is flatly contradicted by the actual written policy. Chrysler's return policies for the relevant time period state:

- **2000:**

  Glass is to be *void of damage* (*repaired glass not acceptable*).

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[3] The district judge's ruling is specifically contradicted by Rule 1002, which requires introduction of the policy.

- **2001:**

  Glass is to be void of damage (repaired glass not acceptable). **Vehicles that arrive at the return center with repaired glass will be placed in a withdrawn status.**

- **2002:**

  Damaged glass must be replaced. Previously repaired windshields are unacceptable. Any windshield replacement at the Marshaling Center must be Mopar/ Safeguard Glass.

- **2003:**

  Damaged glass must be replaced and meet original specifications. Brands include Mopar/Safeguard . . . *Previously repaired windshields are unacceptable.* Mopar/Safeguard should be the first choice brand based on availability in the market place.

That is why the issue is so critical here. The written policy is exactly opposite from the testimony. Because the district judge did not follow Rule 1002, unrebutted false testimony was admitted at trial. The false testimony of Hambrecht and Schemm led the jury to believe that Chrysler's policy was different from that represented by Fas-Break. The thrust of the false testimony was that Fas-Break and, by implication, Ryan, lied (through the mails) about Chrysler's policy. Had the court properly applied the

Best Evidence Rule, all parties (and the jury) would have realized that Chrysler's only written policies provided for zero tolerance regarding windshield damage – exactly as represented by Fas-Break's letter. In other words, the improperly-allowed testimony was directly contrary to the truth.

The Ninth Circuit bypassed this glaring error by finding that the witnesses were not testifying about the written policy, but about their personal knowledge as employees. This finding is wrong and is directly contradicted by the record.

The allowance of the false testimony in contravention of Fed. R. Evid. 1002 is a gross departure from the accepted and usual course of judicial proceedings. The Ninth Circuit sanctioned this departure by ignoring Ryan's argument and failing to hold the district court and the Government to an acceptable standard of performance.

III. THE NINTH CIRCUIT SANCTIONED THE GOVERNMENT'S ELICITATION OF FALSE TESTIMONY. THIS SANCTION IS IN DIRECT CONTRADICTION TO THIS COURT'S HOLDINGS IN *MOONEY v. HOLOHAND* AND *NAPUE v. ILLINOIS*.

When a prosecutor suspects perjury, the prosecutor must at least investigate. The duty to act "is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this

obligation by refusing to search for the truth and remaining woefully ignorant of the facts." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001); *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006).

In *Mooney v. Holohand*, 294 U.S. 103 (1935), this Court held that a conviction obtained through "deliberate deception of court and jury . . . is . . . inconsistent with the rudimentary demands of justice." *Id.* at 112. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court elaborated on the prosecutor's role, noting that "The District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Id.* at 270 (quoting *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 854 (1956)). This Court has emphasized that the presentation of false evidence involves "a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

A. *NAPUE* REQUIRES REVERSAL.

Under the *Mooney-Napue* line of cases, a conviction will be reversed if two conditions are met: first, the prosecution knowingly presented false evidence or testimony at trial; and second, it was material, that is, there is a reasonable likelihood that the false evidence or testimony could have affected the judgment of the jury. *Agurs, supra*, at 103.

1. THE GOVERNMENT KNOWINGLY PRESENTED FALSE TESTIMONY.

As discussed above, the Government solicited false testimony from Schemm and Hambrecht about Chrysler's written policy. The afternoon before the testimony, the Government was faxed, by Thrifty, the actual written policy.

Despite having the policy in hand, the Government questioned Schemm and Hambrecht about the contents of the policy without introducing the policy as evidence. App. 26-28. Instead, the Government led the jury to believe that Hambrecht's and Schemm's characterization of Chrysler's policy was accurate. The Government had the policy in hand showing that Chrysler did not allow damaged windshields, and nevertheless allowed testimony which was flatly contradictory.

In other words, Ryan was convicted for lying to his customers that Chrysler had a policy which did not allow him to return cars with damaged or repaired glass. The only two witnesses the Government called to establish what the Chrysler policy was, testified falsely that Chrysler's written contract with Ryan stated that Chrysler would accept cars with damaged windshields. The Government knew this testimony was false. And, the Government did not correct the record – or introduce the actual contract allowing the witnesses to explain it to the jury.

The Government had a duty to correct the record once Schemm and Hambrecht falsely testified. It

didn't. This conduct is in direct contravention to the *Napue* line of cases, and Ryan's conviction should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant Ryan's Petition for Certiorari.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL W. RYAN Defendant-Appellant.	No. 07-30319 D.C. CR-06-00073-RFC MEMORANDUM*

Appeal from the United States Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted June 4, 2008**
Seattle, Washington

(Filed Jun. 19, 2008)

Before: FERNANDEZ, CALLAHAN, Circuit Judges, and WRIGHT***, District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.May 20, 2008.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Otis D. Wright, II, United States District Judge for the Central District of California, sitting by designation.

Michael Ryan was charged in a 17-count indictment for his involvement in a scheme to defraud car renters and insurance companies by billing and overcharging customers of his Thrifty Car Rental agency for windshield replacements which in fact were never replaced. A jury convicted Ryan of one count of conspiracy to commit mail and wire fraud, fourteen counts of mail fraud and two counts of wire fraud. The district court sentenced him to 71 months imprisonment.

At trial, he sought to suppress government evidence derived from renting several vehicles to undercover FBI agents. He also sought to block the testimony of government witnesses on the grounds of the best evidence rule. There is also a claim that the district court erred in calculating the intended loss amount and number of victims for application of the guidelines. We affirm.

According to the evidence adduced at trial, Ryan and his employees would inform customers that Daimler Chrysler, from whom Thrifty National bought its cars, had a policy which did not permit even the slightest nick to a windshield and so Thrifty billed the customers an average of $1,294 for the cost of replacing the "allegedly" damaged windshield. Some windshields were merely repaired and others were replaced for as little as $220 to $350.

When renters contacted Thrifty to inquire about the charges, they were told that Chrysler had a "zero tolerance policy" and according to that policy, if there

was any damage to the windshield, no matter how slight, the windshield had to be replaced.

Prior to trial, Ryan moved to suppress the evidence obtained by undercover FBI agents. Those agents posed as customers and rented eight cars from Thrifty and created small chips in the windshields. In seven of the eight cases, insurance companies insuring the FBI agents forwarded checks ranging from $700 to $1700 to Ryan's co-conspirators for windshield replacement. Only one of the eight windshields was actually replaced. Ryan contended that the small chips taken from the windshields constituted a seizure of his property without a warrant. The district court denied the motion to suppress finding no meaningful interference with Ryan's possessory interest. We review the district court's denial on the motion to suppress de novo and its factual findings underlying its ruling for clear error. *United States v. Miranda-Guerena,* 445 F.3d 1233, 1236 (9th Cir. 2006).

Ryan held no expectation of privacy in those vehicles. Indeed, he held them out to the general public for rental. That is precisely how the government assumed possession and control of the vehicles – including the windshields. The rentals contemplated normal wear and tear, which included damage to the windshields. It is not clear – and we need not decide – whether intentionally nicking the windshield deprived defendant of something that he had not agreed to, particularly since any loss was charged to and paid by the renters' insurers. In any event, we find that even if chipping of the windshields

constituted a seizure, it was a *de minimus* one, as in *United States v. Jacobsen,* 466 U.S. 109, 125 (1984). The law enforcement interests justifying the procedure were substantial and the interference, considering that the damage was paid for many times over, was minimal.

Ryan also challenges his sentence. Using the 2002 edition of the Federal Sentencing Guidelines Handbook, the U.S. Probation Office's presentence report ("PSR") calculated a base offense level of 6 under §2B1.1(a); added 12 levels based on an intended loss amount of $399,096 under §2B1.1(b)(1)(G); added 4 levels because the offense involved more than 50 victims under §2B1.1(b)(2)(B); and added 2 levels based on Ryan's role in the offense under §3B1.1(2). The PSR attributed 3 criminal history points based on Ryan's prior drug convictions. Based on a total adjusted offense level of 24 and a criminal history category of II, Ryan's sentencing range was projected to be 55 to 71 months of imprisonment. The district court's interpretations of the federal sentencing guidelines are reviewed de novo, its factual determinations are reviewed for clear error, and its application of the guidelines to the facts are reviewed for abuse of discretion. *United States v. Rising Sun,* 522 F.3d 989, 993 (9th Cir. 2008).

The intended loss was calculated as follows:

> a total of 414 invoices were involved in the scheme (which accounts for 39 invoices that were billed on multiple occasions), and each invoice claimed

a minimal replacement value of $330. Also,
the average amount of the invoices was $1,294.
Therefore, $1,294 minus $330 is $964,
which would be the average profit per invoice.
Finally, $964 multiplied by 414 is $399,096.

Ryan contends on appeal that the calculation should have been based on 41 victims. We note, however, that Ryan failed to raise this argument to the district court during the sentencing hearing. Even considering his arguments, they lack merit. There were 414 invoices involved in the scheme. The government argued for the inclusion of more. 487 invoices were introduced at trial. In any event, the methodology employed was sound. *See United States v. Scrivener,* 189 F.3d 944, 949-950 (9th Cir. 1999).

Ryan contends that the trial court erred in permitting two government witnesses to testify in violation of the best evidence rule. (Fed. R. Evid. 1002.) Specifically, two witnesses testified about Chrysler's return policy. We review the district court's evidentiary ruling for abuse of discretion. *See United States v. Plancarte-Alvarez,* 366 F.3d 1058, 1062 (9th Cir. 2004). We find no abuse of discretion. The court permitted the witnesses to testify from their personal knowledge regarding whether, during the periods alleged in the indictment, Chrysler had a policy that the windshields had to be replaced immediately when they were returned chipped or cracked. Here, the witnesses were not testifying about the contents of a policy manual, but from the standpoint of employees,

as to what Chrysler's policy was in practice. Therefore, the best evidence rule was not implicated.

Next, Ryan contends there was a constructive amendment to the indictment or fatal variance caused by a divergence between the conduct proved at trial and that alleged in the indictment. Specifically, Ryan claims that while the indictment asserted that Chrysler's policy required windshield replacement no matter how small the damage, at trial the government introduced evidence of a different alleged misrepresentation, that Chrysler required immediate replacement of windshields. We review de novo a defendant's contention that the district court constructively amended the indictment. *United States v. Adamson,* 291 F.3d 606, 612 (9th Cir. 2002).

Constructive amendment of an indictment occurs when "(1) 'there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument,' or (2) 'the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" *Adamson,* 291 F.3d at 615 (quoting *United States v. Von Stoll,* 726 F.2d 584, 586 (9th Cir. 1984)).

Here, the government stated in its trial brief that it would present testimony that Thrifty employees received incentives to report damage and complete paperwork and "furthered the conspiracy by reciting false representations about the policy against chip repairs and the need for an immediate replacement of

the windshield." We find that the government's emphasis on immediate replacement during trial is not distinctly different from the allegations set forth in the indictment. In short, unlike in *Adamson,* there is no indication that the prosecutor or the court induced Ryan to prepare a defense that would be insufficient to ward off the government's proof at trial.

Lastly, Ryan contends here, as he did in the district court, that he is entitled to acquittal because the government failed to establish that he participated in an illegal conspiracy. We reject this contention as there is ample evidence in the record to support Ryan's conviction. The district court's order is replete with citations to the trial record demonstrating that Loney's testimony alone was sufficient to prove that Ryan agreed to participate in a scheme to charge customers inflated prices to repair a windshield. Thus, there is sufficient evidence in the record to support Ryan's conviction. The conviction is therefore **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,	)	Cause No. CR-06-73-BLG-RFC
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**
v.	)	
MICHAEL W. RYAN,	)	
Defendant.	)	(Filed Aug. 31, 2006)

BACKGROUND

Defendant Michael Ryan is charged in a seventeen count Indictment with conspiracy to commit mail and wire fraud as well as substantive mail and wire fraud counts. The allegations in the indictment pertain to a scheme to defraud customers of Thrifty Car Rental, in Billings, Montana, a business owned by Defendant during the relevant time period. It is alleged that from 1999 to 2003, Defendant conspired with Fas-Break Auto Glass, a local auto glass shop, to defraud his customers or their auto insurance providers. Apparently, when Defendant or other Thrifty employees found a crack in the windshield of a returned rental car, they would forward the damage documentation and the customer's information to Fas-Break. Fas-Break would then contact the customer or the customer's insurance provider for payment. It is further alleged that Fas-Break would bill the insurance companies as much as $1700 for a full

windshield replacement, but would either repair the crack, a repair costing less than $100, or do nothing at all. Defendant allegedly received kickbacks from Fas-Break for these referrals.

During its criminal investigation, FBI agents posing as customers rented eight vehicles from Thrifty. The agents then employed a cooperating witness knowledgeable about the glass industry to intentionally chip the windshields, replicating a rock chip. The cooperating witness also placed superficial scratches on the windshields so that the agents could identify the windshield and later determine whether it had been replaced. The case agent testified that compensation to Thrifty for any damage done to the windshields was a part of the undercover operation from its inception. In seven of the eight cases, insurance companies insuring the FBI agents forwarded checks ranging from $900 to $1700 to Fas-Break for windshield replacement. Only one of those seven windshields was ever replaced, and that was done months after Fas-Break was paid to do so. None of the other windshields was even repaired, let alone replaced.

Presently before the Court is Defendant's Motion to Suppress Evidence Obtained as Fruit of the Government's Illegal and Intentional Destruction of Windshields.

ANALYSIS

This motion is brought on the same grounds as Defendant's Motion to Dismiss for Outrageous Governmental Conduct: Defendant's belief that the FBI agents unlawfully seized his windshields when they, without a warrant, rented vehicles from Thrifty for the purposes of intentionally chipping the windshields. Defendant concedes for the purposes of this argument that government agents can "lie in order to rent cars and disguise their true intentions – so long as their stated and planned intentions are lawful." This comports with cases cited by the Government holding that law enforcement agents are permitted to employ artifice and stratagem in catching those engaged in criminal enterprises. *See Grimm v. United States,* 156 U.S. 604, 610 (1895) (affirming conviction for mailing of obscenities where defendant responded to solicitation by a government agent using an assumed name); *Andrews v. United States,* 162 U.S. 420, 423 (1896) (same – defendant "cannot plead in defense that he would not have violated the law if inquiry had not been made of him by the government"); and *Lewis v. United States,* 385 U.S. 206, 208-09 (1966) (no fourth Amendment violation where federal agent misrepresents his name in order to be invited into defendant's home to purchase narcotics). The Government also asserts its undercover agents did not violate the Fourth Amendment by merely accepting an offer to do business that was freely made to the public. *Maryland v. Macon,* 472 U.S. 463, 469-70 (1985).

However, as noted by Defendant, the authority cited above does not resolve this issue because these cases do not involve the intentional destruction of property. Defendant argues the intentional chipping of the windshields qualifies as criminal mischief under Montana law. *See* Mont. Code Ann. § 45-6-101 (knowingly or purposely injuring, damaging, or destroying any property of another). Defendant further claims Thrifty was offering its vehicles to be driven in accordance with the rental argument, which specifically prohibits intentional misuse of the vehicles, not so that the windshields could be intentionally chipped.

These arguments are not well-taken. In response to Defendant's assertion that suppression is warranted because the agent committed criminal mischief, under Defendant's reasoning, whenever a DEA agent purchases narcotics in an undercover operation, that agents [sic] is guilty of possessing a controlled substance. As this Court is well aware, the law does not consider such action criminal and certainly does not require suppression of the evidence of the sale. Similarly, Defendant argues the FBI conduct in this case clearly violates *Bivens v. Six Unknown Named Agents,* 403 U.S. 488 (1971) (providing civil cause of action for Fourth Amendment violations). If he is correct, he may have an alternative remedy. *See Hudson v. Michigan,* 126 S.Ct. 2159, 2167 (2006) (noting there are alternative remedies for Fourth Amendment violations where suppression of evidence is not required). In any event, the issue with regard

to suppression is whether the FBI "seized" the windshields as that term is defined under the law.

Ordinarily, a seizure of personal property is per se unreasonable under the Fourth Amendment unless it is authorized by a judicial warrant issued upon probable cause and particularly describing the items to be seized. *Illinois v. McArthur,* 531 U.S. 326, 339 (2001) (citing *United States v. Place,* 462 U.S. 696, 702 (1983)). There is no question that the undercover operation in this case was not authorized by warrant. Thus, if the chipping was a "seizure," the FBI should have obtained a warrant prior to the operation, unless the seizure was *de minimis. See United States v. Jacobsen,* 466 U.S. 109, 125 (1984) (destruction of small amount of white powder for field testing was *de minimis* where only a trace amount was involved and where it had already been lawfully detained).

A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. *Macon,* 472 U.S. at 469. In support of his belief that the interference with his possessory interest was "meaningful interference," Defendant offered testimony at the suppression hearing from a person knowledgeable about vehicle values in the vicinity of Billings, Montana. The expert testified that a vehicle with a chipped windshield is worth about $600 less than a vehicle without a chipped windshield. He also stated that it takes two to three days to get the windshield repaired and that this is an inconvenience because the car cannot be sold, or in Defendant's case, cannot be rented, during

this period. The defense expert also testified that a repaired windshield is worth less than a pristine windshield because a repaired windshield will eventually crack due to the extreme high and low temperatures common in Montana. Finally, his testimony established that had the windshield been replaced with a new one, the value of the automobile would not have been adversely affected.

There was no seizure here because there was no meaningful interference with Thrifty's possessory interest in these windshields. First, the fact that a repaired windshield is worth less than a pristine windshield is completely irrelevant – none of the windshields at issue were ever repaired. Second, seven of the eight vehicles were never out of service because the windshields were neither repaired nor replaced. Although one windshield was replaced, it was not replaced until months after the FBI allegedly seized it. If the FBI's actions were "meaningful interference," the Court assumes Thrifty would have replaced it sooner. Third, testimony at the hearing established that the insurer paid between $700 and $1700 for replacement windshields. This is at least $100 and as much as $1100 more than the $600 reduction in value that Defendant's expert assigned to a vehicle with a cracked windshield. If necessary, the Court could take judicial notice of the fact that a windshield can be replaced in Billings, Montana for less than $700 and certainly less than $1700. Thus, Defendant could have replaced the windshield and

still had money left over to compensate him for the time the vehicle was out of service.

Further, even if the chipping of the windshields was a seizure, it was a *de minimis* seizure. *See Jacobsen,* 466 U.S. at 125. Just as in *Jacobsen,* the chipping of the windshields was reasonable because the law enforcement interests justifying the procedure were substantial and the interference, considering that the FBI's insurer paid for the damage, were minimal. 466 U.S. at 125. Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment safeguards and even if there was a seizure, it was not unreasonable for the FBI to act without a warrant. *Id.*

Accordingly, **IT IS HEREBY ORDERED** Defendant's Motion to Suppress Evidence Obtained as the Fruit of the Government's Illegal and Intentional Destruction of Windshields *(Doc. 16)* is **DENIED.**

The Clerk of Court is directed to notify the parties of the entry of this order.

DATED the 31st day of August, 2006.

/s/ *Richard F. Cebull*
RICHARD F. CEBULL
UNITED STATES
DISTRICT JUDGE

cc:

AUSA Eric Wolff
AUSA Leif Johnson
Mark Parker
USM
Probation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL W. RYAN, Defendant-Appellant.	No. 07-30319 D.C. No. CR-06-00073-RFC District of Montana, Billings ORDER (Filed Jul. 28, 2008)

Before: FERNANDEZ and CALLAHAN, Circuit Judges, and WRIGHT,*, District Judge.

The panel denies appellant's petition for rehearing and restoration to calendar for oral argument.

The full court has been advised of appellant's petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed July 1, 2008, are DENIED.

* The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

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United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL W. RYAN, Defendant.	CR-06-73-BLG-RFC VOLUME 3 TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RICHARD F. CEBULL
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Wednesday, December 6, 2006
08:27:00 to 17:04:03

* * *

[820] a current master lease agreement on file.

Q So when Mike Ryan leases cars, he's leasing them from you?

A That's correct.

Q Now –

A Not – excuse me. I shouldn't say – not all of his cars are leased from us. We offer them to our franchisees. I don't know what other cars he may have had.

Q But you are generally very familiar with the – I mean, tell me if you're not – with the Daimler-Chrysler program that's offered to Thrifty franchisees?

A Yes, I am.

Q Can you explain that program for the jury?

MR. PARKER: Your Honor –

THE COURT: Well –

MR. PARKER: – I object.

THE COURT: Even without seeing the contract with a specific franchisee, are they all the same? Are the contracts I all the same?

THE WITNESS: Basically.

THE COURT: Standard form?

THE WITNESS: Yes. It's a standard order form that we put out. It's a standard program book that we issue to all of our franchisees. The only, the only thing that may be different would be a master lease agreement, but I know that [821] there are certain parameters that all master lease agreements have.

THE COURT: Are you aware of the parameters that all master lease agreements have and the arrangements that your company makes with franchisees, whether you have the agreement in front of you or not, the actual agreement of the franchisee?

THE WITNESS: I know the general parameters without knowing – without having the agreement in front of me. Obviously I wouldn't be able to speak to any differences.

THE COURT: Are those the kinds of questions you're going to ask?

MR. WOLFF: Yes, but if Your Honor would prefer, well give him all that stuff and he can come back tomorrow.

THE COURT: That would solve some problems. It's not what I'd prefer. It's what the law most likely requires.

So we're going to take an early recess. We'll be in recess until 8:30 in the morning. It isn't that early; 21 minutes.

We're going to be in recess until 8:30 in the morning. I give you the usual admonition. Don't talk amongst yourselves about the case. Don't talk to anybody about the case. Don't read any newspaper articles or listen to any TV reports or radio reports about the case. Keep an open mind about this case until all of the evidence is in and it has

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL W. RYAN, Defendant.	CR-06-73-BLG-RFC VOLUME 4 TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RICHARD F. CEBULL
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Thursday, December 7, 2006
08:32:46 to 15:43:03

* * *

[869] WHEREUPON,

MR. MARK STEPHEN SCHEMM,

called for examination by counsel for plaintiff, after having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. WOLFF:

Q Mr. Schemm, could you state your full name for the court reporter?

A Yes. Mark Stephen Schemm.

Q And tell the jury a little bit about yourself. Where do you live? What do you do for a living?

A I live in Michigan, just outside Detroit. Been with DaimlerChrysler for about 32 years. The last, since 1984, I've been involved in the vehicle remarketing department as the national operations manager.

Q So are you familiar with the requirements that DaimlerChrysler imposes when it leases to fleets?

A Yes. We're kind of the back end. We're responsible for when the vehicle is being returned to the marshaling yard.

Q What's a marshaling yard?

A Well, we have probably about 26 marshaling yards around the country.

Q Would other people know that as an auto auction?

A Well, no. The auto auction is separate. In the [870] marshaling yard is where the inspection is done to accept the vehicle, write up any damages, and then, from there, if it's accepted, it's shipped to an auction for sale.

Q And do you work at all with Dollar Thrifty on their lease program?

A Yes.

Q And are you familiar with the requirements under that program?

A Yes.

Q Does DaimlerChrysler – that's you. Does DaimlerChrysler require Thrifty, have they ever, that when a rental car is in service and there's windshield damage, that the windshield needs to be replaced immediately?

A No, not while it's in service.

Q I'm going to show you a letter, 27, page 2. And, Mr. Schemm, it will come up on that screen right there.

A Okay.

Q This has been entered into evidence, and I just want to go over a couple of statements.

"We realize that the damage to the rental," and this is a Thrifty rental, "was a windshield crack. The reason that it is replaced instead of being repaired, when possible, is that the vehicles are not owned by Thrifty but, rather, by the Chrysler Corporation."

I'm going to stop right there. When that vehicle is at [871] the franchisee's, who owns it?

A It's owned by Thrifty. We don't take title to any –

Q You want to talk into the microphone.

A I'm sorry. It's owned by Thrifty. We don't take title to any rental vehicles at all, for any cars.

Q And was that true between 1999 to 2003?

A Yes.

Q Next sentence. "Chrysler sends their district fleet manager to Thrifty's lot to inspect the vehicles regularly, and Chrysler will not allow Thrifty to do chip repairs."

In your experience under this program, are you aware of district fleet managers going to a rental car lot and inspecting windshields?

A No. Definitely not.

Q How about allowing chip repairs while the car is in rental service?

A They can do chip repairs while it's in service, but it will be rejected if it's returned for sale to us.

Q Okay. Next sentence. "Any damage what-soever to the windshields must be replaced according to Chrysler." Is that a true statement?

A It depends. We do allow a certain amount of damage –

MR. PARKER: Objection as to time.

MR. WOLFF: I'll ask about time periods when he finishes his answer.

[872] THE COURT: Pardon?

MR. WOLFF: I'll ask about time periods when he finishes his answer.

THE COURT: All right. Overruled.

BY MR. WOLFF:

Q You said it depends.

A Yeah. If it's a chip that has legs on it that's going to run, that's something, at the time of inspection, we'd write up for a new windshield. We do allow a number of chips in, I believe it is, the 1/8th-of-an-inch category that, without legs on it, that would be acceptable.

Also, we get a lot of sandblast out west on the windshields. Those are very little chips all over the windshield. We allow all that unless it's in the driver's line of sight.

Q Now, Mr. Schemm, how long has that been the policy, to accept those types of damages without a charge?

A Since – well, I came into remarketing in '84. It was there then, so it had to be prior to '84.

Q And did it change between '84 and the present, or –

A No.

Q How about '99 to 2003?

A No.

Q '99 to 2003, did you sort of clamp down and charge for everything?

[873] A No, no.

Q It's been the same?

A Yes.

MR. WOLFF: Let's show Government's 91, please.

DOCUMENT TECHNICIAN: (Complied with request.)

BY MR. WOLFF:

Q Mr. Schemm, while she's getting that exhibit, that policy, is that in any manuals or books or anything that a person would read?

A Yes. There's a, there's a return policy that's issued to all of the rental accounts at the time they decide to order new vehicles under our program, and it's part and parcel of the entire program, so, yeah, that's, that's something – all requirements are spelled out. It's about a 40-page document.

Q And if somebody had any questions about what was acceptable or wasn't acceptable, would you tell them, or would you just let them try and figure it out on their own?

A Oh, definitely we would tell them, yes.

Q And could they call DaimlerChrysler?

A Oh, absolutely.

Q Could they call Thrifty National?

A Yes.

Q And let's just say if a forgetful attorney for the government didn't tell people to bring the manual – well, did anyone ask you to bring a manual here?

[874] A No.

MR. PARKER: And I'm going to object. I'm going to object to any discussion of a manual that this jury can't see.

THE COURT: Overruled. If he has knowledge of it, he can testify.

BY MR. WOLFF:

Q Do you have knowledge of a policy appearing in DaimlerChrysler manuals – well, let's just look at Exhibit 91, and then I'll ask you about that.

Can you see that, or do I need to make it larger?

A Yeah, I can see it.

Q Okay. I'm going to circle something here. This car comes through. It says, "Windshield, Chipped," and then there's a zero charge. And the date on this is 11/7/02.

How could that be? Like give us a sense of like what that chip would be that would get a zero charge.

A That could typically be one or two chips on the windshield without any legs on them. That would be acceptable.

Q And do you personally know if the manual, between '99 and 2003, would tell a franchisee that?

A Yes.

MR. PARKER: Objection. Best evidence.

THE COURT: Overruled.